In the Supreme Court of the United States.

OCTOBER TERM, 1914.

TERMINAL RAILROAD ASSOCIATION OF St. Louis et al., appellants,
v.
THE UNITED STATES.

No. 572.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

MOTION TO DISMISS.

The Solicitor General on behalf of the United States respectfully moves that this appeal be dismissed.

The appeal is from an order of the United States District Court for the Eastern District of Missouri, entered June 20, 1914, denying a motion by defendants in the case of *United States* v. *Terminal Railroad Association of St. Louis et al.*, a suit under the antitrust act of July 2, 1890, to modify the final decree theretofore entered in that case. (R. 43.)

The motion in question was filed on March 28, 1914. (R. 24–25.) Prior thereto, to wit, on March 27, 1914, the United States had duly perfected an

appeal to this court from the aforesaid final decree, assigning as error the failure of the District Court properly to carry out the opinion and mandate handed down by this court at the October Term, 1911. (R. 51–54.)

It is thus apparent on the face of the record that at the time appellants' motion was filed the District Court was wholly without power or authority to make any order affecting or modifying the decree, for the reason that the jurisdiction of this court had attached and become exclusive through the perfecting of an appeal by the United States.

That the jurisdiction of an appellate court becomes complete and that of the trial court ceases at the time an appeal or writ of error is perfected is elementary. *Bronson* v. *La Crosse R. R. Co.*, 1 Wall. 405, 409; *Brooks* v. *Norris*, 11 How. 203; *Keyser* v. *Farr*, 105 U. S. 265; *The "S. S. Osborne,"* 105 U. S. 447, 450; *Ensminger* v. *Powers*, 108 U. S. 292; *Roemer* v. *Simon*, 91 U. S. 149; *Hovey* v. *McDonald*, 109 U. S. 150, 157; *Burnham* v. *North Chicago Street Ry. Co.* (C. C. A. 7th C.), 87 Fed. 168; *Morrin* v. *Lawler* (C. C. E. D. N. Y.), 91 Fed. 693. Therefore after a writ of error or appeal has been perfected the lower court is without power to modify its judgment or decree.

In *Roemer* v. *Simon*, 91 U. S. 149, the Chief Justice, in denying the motion, made after an appeal had been taken to this court, to set aside the decree

of the court below and grant a rehearing, said (p. 150):

> * * * It would be useless to remand this cause, * * * as the term at which the decree was rendered has passed. If the term still continued, the proper practice would be to make application to the court below for a rehearing *and have that court send to us a request for a return of the record, in order that it might proceed further with the cause.* Should such a request be made, we might, in a proper case and under proper restrictions, make the necessary order. * * * (Italics ours.)

In *Ensminger* v. *Powers,* 108 U. S. 292, in deciding that the period during which an appeal was pending in this court should not be counted against the appellant in ascertaining whether her bill of review was filed in time, this court said (p. 302):

> * * * The pendency of the appeal by Bridget Powers would have been a valid objection to the filing of a bill of review by her for the errors in law now alleged. * * * *While the appeal was pending here, although there was no supersedeas, the circuit court had no jurisdiction to vacate the decree, in pursuance of the prayer of a bill of review, because such relief was beyond its control.* (Italics ours.)

In *Citizens' Bank of Wichita* v. *Farwell,* 56 Fed. 539, the Circuit Court of Appeals for the Eighth Circuit, in dismissing a writ of error sued out to

review an order of the trial court overruling a motion to set aside the judgment while a previous writ of error was pending, said:

> * * * The removal of the case into this court under the first writ of error transferred the jurisdiction of the suit to this court, and the jurisdiction of the lower court over the case was at an end.

In *First National Bank* v. *State National Bank* (C. C. A. 9th C.), 131 Fed. 430, the court said (p. 431):

> * * * The overwhelming weight of authority of the State courts is that an appeal, properly perfected, absolutely removes the case from the trial court, and places it in the appellate tribunal. The case must, of necessity, either be in the appellate court or lower court. It can not very well be in both courts at the same time. Such a course would lead to endless confusion. Under all the ordinary rules of practice, the appellate court alone would have the jurisdiction.

In *Morrin* v. *Lawler* (C. C. E. D. N. Y.), 91 Fed. 693, it was said (p. 694):

> * * * When all the steps necessary to perfect an appeal to an appellate court have been properly taken, the action is within the control of that court, and the trial court should not engage in undoing or modifying the proceedings by which such jurisdiction has been obtained.

See, also, *Morgan's Louisiana & T. R. & S. S. Co.* v. *Texas Cent. Ry. Co.* (C. C. Tex.), 32 Fed. 525, 530 (opinion by Mr. Justice Harlan); and *Kimberly* v. *Arms* (C. C. Ohio), 40 Fed. 548, 550.

Wherefore it is submitted that it is apparent on the face of the record that this appeal is irregular, frivolous, and useless and should be dismissed.

JOHN W. DAVIS,
Solicitor General.
EDWARD C. CROW,
Special Assistant to the Attorney General.
SEPTEMBER, 1914.

○

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, *et al.*,
Appellants,
v.
THE UNITED STATES.

No. 442.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

REPLY TO MOTION TO DISMISS APPEAL.

H. S. PRIDDY,
T. M. PIERCE,
Solicitors for Appellants.

Rand Brothers Pr., St. Paul, Min. St. Louis, Mo. Blue Grass Press, Bath, Chicago.

CONTENTS.

	Pages.
Statement	1- 2
Argument	2- 5
Appendix A	6–11
Appendix B	12–14
Appendix C	15–17

CITATIONS OF AUTHORITIES:

Perkins v. Fourniquet, 14 How. 328-330;
Moran v. Hagerman, 64 Fed. 499;
Kingman v. Western Mfg. Co., 170 U. S. 675.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *et al.*,
Appellants,

v.

THE UNITED STATES.

No. 572.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

REPLY TO MOTION TO DISMISS APPEAL.

STATEMENT.

The motion to dismiss this appeal is based upon the fact that the motion (Appendix C), made by the Terminal Railroad Association *et al.*, defendants below and appellants here, was filed **after** the plaintiff had appealed from the decree (Appendix A) to which the motion was addressed.

This decree, from which the Government appealed, was entered pursuant to the mandate of this court and in accord with it, **except** that portion which the motion of appellants sought to expunge or modify.

Appellants resist the motion to dismiss upon two grounds:

First. The Government's appeal did not supersede or stay the decree;

Second. By express terms of the decree (Appendix A), the court retained jurisdiction, the final clause being as follows: **"This cause is reserved for such further orders and decrees as may be deemed necessary."**

ARGUMENT.

Did the appeal of the Government operate to stay the proceedings in the case? If not, it did not divest the District Court of jurisdiction.

But for the early decision of this court in Perkins v. Fourniquet, 14 How. 328-330, it might be doubted whether the Government was entitled to appeal from the decree of the District Court entered as directed by the mandate of this court. This court there held that either mandamus or appeal might be used. It also held that an appeal, if taken, would not stay the proceedings, and the court might, notwithstanding the appeal, proceed to execute the judgment.

The case is so tersely put by Chief Justice Taney that we quote what he said on the motion to dismiss the appeal:

> "This objection to the form of proceeding, involves nothing more than a question of practice. The mandate from this court left nothing to the judgment and discretion of the Circuit Court, but directed it to carry into execution the decree of this court, which was recited in the mandate. And if the decree of this court has been misunderstood, or misconstrued by the court below, to the injury of either party, we see no valid objection to an appeal to this court, in order to have the error corrected. The question is merely as to the form of proceeding which this court should adopt, to enforce the execution of its own mandate in the court below. The subject might, without doubt, be brought before us upon motion, and a mandamus issued to compel its execution. But an appeal from the decision of the court below, is equally convenient and suitable; and, perhaps, more so,

in some cases, as it gives the adverse party notice that the question will be brought before this court, and affords him the opportunity of being prepared to meet it at an early day of the term. **The appeal certainly would not stay proceedings. And it would be the duty of the Circuit Court, notwithstanding the appeal, to proceed to execute the judgment of this court, unless, as in this case, he entertained doubts of its construction and meaning, and deemed it therefore, just and equitable to suspend its execution, until the decision of this court could be had in the premises."**

We think this case makes a distinction between an appeal from a decree on the merits of a controversy and an appeal involving the construction of a mandate issued from an Appellate Court directing the final disposition of the case on its merits.

So, the decree being enforcible against the defendants, notwithstanding the Government's appeal, and the court having reserved jurisdiction to make such further orders as may be deemed necessary, the defendants had the right at any time to apply, by motion or otherwise, to the District Court for relief from what it conceived to be an error in its decree, the enforcement of which would injuriously affect these appellants, even at a subsequent term of the court; and, upon the relief being denied, to appeal to this court.

In Moran v. Hagerman, 64 Fed. 499, it was held that a decree may be modified by a lower court at any time to conform to the mandate of the Supreme Court.

The time for an appeal from the denial of the motion to modify did not begin to run until the motion was disposed of.

Kingman v. Western Mfg. Co., 170 U. S. 675.

We respectfully submit the motion to dismiss this appeal should be overruled, and the defendants' motion (to which we beg to refer) to consolidate this cause with

the case of the Government's appeal should be sustained.

We append copies of the final decree of the District Court, the opinion of Judge Smith, (Appendix B), and the defendants' motion to modify it.

H. S. PRIEST,

T. M. PIERCE,

Solicitors for Appellants.

"APPENDIX A".

IN THE

District Court of the United States

FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

THE UNITED STATES OF AMERICA,
Complainant,

v.

THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, ET AL.,
Defendants.

This cause came on to be heard at this term, and it appearing that the United States of America, complainant, heretofore appealed to the Supreme Court of the United States from the final decree of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, dismissing this cause on June 6, 1910; and the Supreme Court of the United States at its October Term, 1911, having duly heard said appeal upon the Transcript of the Record, and having thereupon on the 22nd day of April, 1912, ordered, adjudged and decreed that the said decree of the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri in this cause be and the same is hereby reversed, and that said cause is remanded to this Court for further proceedings in accordance with the mandate of the Supreme Court of the United States in

this cause bearing date the twenty-third day of May, 1912.

And afterwards, to-wit, it appearing that on the 16th day of June, 1913, a preliminary decree was entered in accordance with the mandate of the Supreme Court, now, therefore, it is ordered, adjudged and decreed by the Court as follows:

1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Anti-Trust Act of July 2, 1890 (26 Stat, 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and modifying its contracts as herein specified.

An election having been made to continue the combination for terminal purposes the defendants are therefore perpetually enjoined from in any wise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered.

2. The Agreement of October 1, 1889, between the Terminal Railroad Association and various other defendants, known in the record as Exhibit "A," shall be reformed in the following manner:

(a) The provision thereof reading as follows shall be eliminated:

> "III. In consideration of the foregoing each of the proprietary companies, for itself only and not for others, accepts the right of joint use hereinbefore granted by the first party and hereby covenants and agrees that it will forever make use of the bridge and terminal properties of the first party, as above described, for all passenger and freight traffic within its control through, to and from St. Louis and destined to cross the Mississippi River at St. Louis, and pay therefor as herein provided."

(b) The provision thereof reading as follows shall be eliminated:

> "XVII. Neither party shall sell, assign, transfer or underlet the rights and privileges hereby granted, or any of them, to any other company or companies without the unanimous consent of the Board of Directors of the first party."

In lieu thereof the following may be inserted: "No proprietary or using compny shall sublet its rights and privileges in the use of the terminal facilities to any other company or companies."

(c) The provision thereof reading as follows shall be eliminated:

> "XIX. This agreement may be executed in counterparts, and any railroad company not named as second party hereto, may be admitted to joint use of said terminal system on unanimous consent, but not otherwise, of the directors of the first party, and on payment of such a consideration as they may determine, and on signing this agreement or any counterpart thereof thereby indicating its rights and duties in respect to use of said terminal system to be the same and none other than the said proprietary companies named as second party hereto."

In lieu thereof the following shall be inserted:

(1.) In case any other railroad company, not named as second party hereto, shall hereafter desire to become a member of the Terminal Railroad Association of St. Louis, it may become a member thereof, with equal rights of joint ownership and control of the combined terminal properties of said Association, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens of the parties hereto of the second part.

(2.) Any other railroad company not electing to become a joint owner as above provided, but desiring the use of the terminal facilities of the Terminal Railroad Association of St. Louis may enjoy the use thereof upon such just and reasonable terms and regulations, as will in respect of use, character and cost of service, place it upon as nearly an equal plane as may be, with respect to expenses and charges, as that occupied by the proprietary companies.

(3.) Any dispute or controversy which shall hereafter arise between any railroad company applying for joint ownership or use of the said terminal properties and the owning, proprietary companies shall be submitted to the United States District Court for the Eastern Division of the Eastern District of Missouri by filing a petition in this cause setting out specifically the facts upon which the said parties have disagreed and the party so filing said petition shall at least fifteen (15) days before so doing so serve the other party to the controversy with a copy of the petition proposed to be filed, together with a notice that said petition will be filed on a certain designated day. Thereupon the matter shall be placed upon the docket of the United States District Court for the Eastern Division of the Eastern District of Missouri, and shall be heard when called in its regular order on said docket and the proceedings shall be subject to review by appeal as in any other cases. Upon being

advised by the filing of a petition of such dispute or controversy the court may at once admit the applying company to ownership or use of the terminal facilities during the pendency of the proceeding upon the giving of security in amount and form as it may direct.

(d) All provisions of the purport or effect of those eliminated from the Agreement of October 1, 1889, shall also be removed from all other contracts affecting the ownership or use of the terminal facilities to which the Terminal Railroad Association and the proprietary companies or any of them are parties. The benefits and burdens of the amended agreement shall inure to and rest upon all future proprietary and using railroad companies respectively.

3. Hereafter traffic destined to St. Louis, Missouri, or to points west of the Mississippi River and to be transported through the St. Louis gateway or traffic from St. Louis, Missouri, destined to points east of said river, shall not be billed to East St. Louis, Illinois, or other junction points or termini of the railroads of any of the said railroad companies east of the river and then rebilled to destination, but for all such traffic each railroad company shall issue through bills of lading unless otherwise directed by the person controlling the same. The defendants are perpetually enjoined from violating the above provisions.

4. The defendants are perpetually enjoined from making any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one hundred mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

5. The provisions of this decree shall extend to and

embrace all railroad companies now or hereafter admitted to joint ownership or use of the facilities of the Terminal Railroad Association and to all its facilities present and future acquired.

6. Nothing in this decree shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Railroad Association, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission.

7. This cause is reserved for such further orders and decrees as may be deemed necessary.

WALTER H. SANBORN,
WILLIAM C. HOOK,
WALTER I. SMITH,
Circuit Judges.

St. Louis, January 29, 1914.

Filed March 2, 1914.
W. W. Nall, Clerk.

"APPENDIX B".

IN THE

District Court of the United States

IN AND FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

THE UNITED STATES OF AMERICA,
Complainant,

v.

THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, ET AL.,
Defendants.

SMITH, Circuit Judge.

The members of the Court have entertained and now entertain divergent views as to what the decree in this case should be notwithstanding the opinion of the Supreme Court, which is our guide and which all of us are cheerfully desirous of following according to its true intent.

The foregoing decree is in the nature of a compromise of these divergent views and as such I have signed it, but I could not do this without expressing my personal opinion briefly upon the subject.

The fixing of rates for the future is a legislative and not a judicial function.

There are numerous roads which do not extend beyond the State of Illinois which terminate at East St. Louis. One of these is only eight or ten miles long. It probably cost not to exceed three hundred thousand

dollars for the entire road. It is now contended that the Supreme Court meant to hold that for whatever price this road saw fit to haul coal to East St. Louis or for whatever price might be fixed by Illinois it must haul it to St. Louis over property including bridges, right-of-way and trackage worth many millions of dollars.

I cannot reach that conclusion and chiefly because such a decree would be beyond the jurisdiction of this or any other human court even as a part of the jurisdiction of a court of equity to award complete relief. It is distinctly a legislative function and until Congress or the Interstate Commerce Commission shall so fix the rates no judicial tribunal has any power to so decree.

2. Not only has the Interstate Commerce Commission not so decreed, but it has long held that such an order should not be made.

> Commercial Club of Omaha v. C., R. I. & P. Ry. Co., 6 Interstate Commerce Commission Rep. 647;
>
> See other cases cited in Pierce's Digest of Decisions under Act to Regulate Commerce, 405-6-7.

3. Wholly aside from both of these questions if this decree means the rate must be the same from points in Illinois to East St. Louis, Illinois, and to St. Louis, Missouri, then an intrastate and an interstate rate are indissolubly united and the State of Illinois has thus power to fix interstate rates.

It has recently been held that before State rates can be declared unconstitutional the entire intrastate business must be taken into account.

For this reason the State of Illinois could put in a non-compensatory coal rate to East St. Louis if the rates as a whole were compensatory.

There is substantially no limit the State cannot go to in reducing the rates on any given commodity provided the entire body of rates is compensatory.

It was held in the Minnesota Rate Cases, 230 U. S. 352, that the Interstate Commerce law did not divest the State of the power to make rates throughout its limits and so under no provision of the existing law, State or Federal, could the rate on coal from points in Illinois to East St. Louis be decreed invalid unless the entire schedule of rates was non-compensatory.

It is apparently the opinion of at least a part of the Court that this decree without legislative action ties interstate rates onto State rates so that while the United States under the existing laws cannot control State rates a State may control United States rates

This is abhorrent to me and I do not think is the true construction.

Assuming without admitting that a terminal company cannot establish different switching rates for different zones I submit that the various railroads independently of what they pay for switching may establish one rate to East St. Louis and another to St. Louis and in the absence of some action by Congress or the Interstate Commerce Commission there is no power to interfere with their doing so under this decree or otherwise.

Except Congress or the Interstate Commerce Commission act there is no one authorized to so order.

Assuming again that the Terminal Company cannot establish different switching rates for different zones, I am satisfied that irrespective of what switching rates they have to pay the railroads have the right to charge a higher rate into St. Louis on Illinois coal than they do to East St. Louis on the same coal.

Filed March 2, 1914.
W. W. Nall, Clerk.

"APPENDIX C."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

THE UNITED STATES OF AMERICA,
Complainant,
v.
THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *et al.*,
Defendants.

Come now the defendants in the above entitled cause and move the court to modify Article 1 of the Final Decree herein entered, which is as follows:

> "1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Anti-Trust Act of July 2, 1890, (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation, and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and modifying its contracts as herein specified.
>
> "An election having been made to continue the combination for terminal purposes, the defendants are therefore, perpetually enjoined from in any

wise managing or conducting the said Terminal Railroad Association or any of its constituent companies, and from operating any of the properties belonging to it or its constituents, otherwise than as terminal facilities for railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered."

By striking out all of said paragraph:

First: For that, it appears that the defendants herein have conformed to the special directions contained in the Supreme Court's decree herein and the special directions of the interlocutory order of this court herein, pursuant to the mandate of the Supreme Court, and, having done so, said Terminal Association has ceased to be an unlawful combination, contrary to the Anti-Trust Act of July 2, 1890, as found by this court in the first paragraph of said Article 1.

Second: Because defendant, Terminal Railroad Association of St. Louis, is enjoined from making charges otherwise than for supplying and operating facilities for the interchange of traffic between railroads, and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage and the like, and is required to abandon all operating methods and charges as and for railroad transportation;

For that, while the general scheme and purpose of the Terminal Association, and its subsidiary companies is that of affording terminal advantages and facilities to railroad companies, yet, as an incident to that business, and on account of the necessary extent of its tracks, covering an area of seventy-five to one hundred square miles, it is frequently called upon to take traffic from one point on its line to another point on its line, completing the entire movement on its own tracks.

As an illustration: The Terminal Association operates in the early morning and late in the afternoon some trains to transport laborers engaged in industrial factories from Granite City, Illinois, to the different stations on its line in St. Louis, Missouri. This it is prohibited from doing under the decree.

Another illustration: Many factories are located upon the Terminal Association's tracks on both sides of the Mississippi River. Under this order the defendant, Terminal Association, would be restrained from accepting either raw material or finished products shipped from one such factory to another, although it could, with great convenience to the public, render such service.

These are incidents, but very important incidents, to the principal business of the Terminal Association, and, we submit, were not in contemplation of the decree ordered by the Supreme Court.

H. S. PRIEST,

T. M. PIERCE,

Attorneys for Defendants.